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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 355

TRINITYFARM CONSTRUCTION COMPANY,

APPELLANT,

vs.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF THE STATE OF LOUISIANA,

APPELLEE.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

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May It Please the Court:

This case is the first instance, so far as our investigation has disclosed, in which a state has been permitted to pass the burden of an excise tax directly upon the federal treasury. That such is the effect of the opinion is demonstrably true.

It sufficiently appears from the opinion that the contract between the government and appellant is the federal instrument here involved. A different

conclusion could not have been reached consistently with the facts and with numerous decisions of this Court. Choctaw & Gulf R. R. Co. v. Harrison, 235 U. S., 292; Gillespie v. Oklahoma, 257 U. S. 501; Burnet v. Coronado Oil & Gas Co., 285 U. S. 393; Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522. The validity of the tax is to be determined with reference to its practical effect—as to how its burden falls—upon that contract.

Appellant has not denied its status as an independent contractor. It has not asserted that it is a governmental instrumentality. It has asserted, and it bases its claim upon the assertion, that its federal contract is a federal instrument or means and that such contract, by the decisions of this Court, is immune from direct burden by state tax.

Appellant recognizes that property taxes laid upon its equipment constitute no such burden. This was first ruled in McCulloch v. Maryland, 4 Wheat, 316, 400, 436, and has been reaffirmed in innumerable cases since with reference both to federal instruments and to interstate commerce.

Appellant affirms, on the other hand, that taxes upon its operations fall directly upon its contract and are, accordingly, prohibited. The precise question has not heretofore been before the Court but its decisions in analogous cases lead inevitably to the conclusion relied upon.

It cannot be regarded as necessary to comment at any length upon the differences in nature and effect between a property tax and a tax on operations—an excise tax. This Court has repeatedly made the

distinction and sustained the former while holding the latter void. Choctaw O. & G. Ry. Co. v. Oklahoma, 235 U. S. 292; Choctaw O. & G. Ry. Co. v. Mackey, 256 U. S. 531.

The distinction has been universally recognized and applied in interstate commerce cases. Physical properties of carriers situated within a state are subject to property taxes even upon values arrived at by reference to use in interstate commerce but, as stated in East Ohio Oil Co. v. Commission, 283 U. S. 465, it is elementary that a state cannot lay a tax on the act of engaging in interstate commerce. See also Pullman Co. v. Richardson, 261 U. S. 330; Anglo-Chilean Nitrate Co. v. Alabama, 288 U. S. 218; Helson v. Kentucky, 279 U. S. 245.

This distinction, consistently with innumerable former rulings of this Court, should be given effect here unless, indeed, this case is intended to mark the point of definite departure from the former rule. The Court says: "If the payment of state taxes imposed on the property **and operations** of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct." We have not found another case where the Court, when called upon to decide questions identical in principle, has combined the two types of taxes in announcing the rule. On the contrary, the distinction has been steadfastly maintained and adherence to it has provoked dissents of unusual vigor.

It is recognized that two schools of thought exist upon this vexed question. One, heretofore approved by the majority opinion of this Court, maintains

that immunity, to be substantial, must extend to operations of the protected undertaking, whether it be that of a federal instrument or a transaction in interstate commerce; the other supports the view that the practical requirements of immunity are met notwithstanding operations necessarily involved in the protected undertaking are made subject to state taxes of general application not aimed specifically at such undertaking.

It is a question of policy, rather than one strictly of law, and the correct policy is to be determined exclusively by this Court. That both views are supported by arguments of great strength and cogency goes without saying.

Pertinent to a determination of the correct policy is a brief review of the essential bases of the two types of tax involved. A property tax is properly laid upon all property within the taxing jurisdiction. In return for the tax so laid the taxing sovereign extends protection to the right of ownership. Property so subjected to the tax is held by local law, is protected by exertion of local powers. That it should pay its fair share of the costs of these local services is universally recognized.

Excise taxes, on the contrary, find no basis in the protection of rights of ownership. On the contrary they are additional taxes, laid to secure revenue, for which nothing is directly returned to the taxpayer. Prior to enactment of the tax here under consideration gasoline was handled in the state in the exercise of natural rights of the citizen. The state needed additional revenue and exacted of dealers a price

for the privilege of doing what had theretofore been permitted without price. In so far as its jurisdiction extends the state was admittedly within its rights in making this levy.

But beyond its jurisdiction it is without power. This Court has recognized state sovereignty as extending to everything which exists by its own authority or is introduced by its permission. Such are its defined limits. That it has no control of any kind or degree of any property or right beyond its sovereignty is elementary.

Unless this Court has now announced a different rule, the sovereignty of Louisiana does not extend to appellant's contract with the government. Certainly the contract does not exist by state authority, nor is it introduced into the state by its permission. Upon what theory, then, can the state exact a price for the privilege of performing operations required by the contract? But for exertion of government power the contract would never have come into existence; would never have been performed in Louisiana or elsewhere. Only through federal generosity in an effort to protect the lands and citizens of the state from floods is the subject of the attempted tax brought wthin the borders of the state. But for the disaster occasioning this relief there would have been no operation for the state to tax. Whence comes its jurisdiction—and sound basis for exertion of the assumed power? It is wanting in fact as it is denied by precedent.

In the beginning, in a state of society much less complicated than that in which we live, the rule was stated in absolute terms and in language which for-

bade interference of any character or in any degree by a state with subjects of federal jurisdiction. In the interval the rule has been given practical application many times and, almost without exception, with a tendency to restrict its scope. It is here reannounced but denied application notwithstanding the whole burden of the questioned tax must be discharged with federal funds; funds, it is true, first paid to the contractor and then by him paid to the state but, none the less, funds coming directly from the treasury and the payment being one which, but for the tax, would be saved by the treasury. The burden thus imposed on the treasury is held consequential and remote. It is submitted that it is, in fact, inevitable and direct.

It is indicated in the opinion that a tax laid upon the contract would be held void. Is not a tax laid as the price of the privilege of performing the contract in fact laid upon the contract? This Court, by strongest analogy, has so held. In the Helson case and in many other decisions on interstate commerce are found repeated statements difficult, if not impossible, of reconciliation with a different view.

The Helson case has properly been limited to the facts there presented but, as so limited, it is still the law unless, indeed, it must be considered as overruled in principle by the decision here. The two cases are identical except that there the gasoline was used in performing an act of interstate commerce while here it is used in performing a federal contract. It cannot reasonably be said that a tax laid upon use of gasoline in interstate commerce directly burdens

that commerce and at the same time asserted that an identical tax laid upon use of gasoline in a federal contract does not directly burden that contract. It is self evident that the same tax, laid on the same operation, must of necessity, exert an identical burden on each undertaking. The burden may be prohibited in one case and permitted in another, but this circumstance cannot alter the fact that the incidence of the tax is the same upon each undertaking.

Even if precedent in this Court were lacking it could not reasonably be doubted that the burden of the questioned tax falls directly upon the contract; that it is in effect laid upon the contract. The contract is something more than the writing which evidences its terms. It is a continuing relationship between the parties to it. It demands of appellant the performance of certain operations—certain acts which must be done to complete the work called for by the contract. The whole value of the contract depends upon the aggregate cost of those operations. If those costs are increased its value is lessened; it is directly burdened to the exact extent of the increase. If a state may tax each operation involved, as is here held, it may add to the cost of those operations at will; may completely destroy the whole value of the contract. To deny that such a burden is inevitable, that it is direct or that it may become utterly destructive is to disregard universal human experience.

But, it may be said, the burden, if it be directly upon the contract, falls upon the contractor, not upon the government. The proposition cannot be

conceded. Admittedly, the government has no peculiar concern for the welfare of the contractor, and if he alone is affected the case is without merit. But the tax in operation falls directly upon the government and not upon the contractor. Its full effect falls directly upon the government at the very inception of the transaction; at the time the government bargains for the price of its work.

An actual case will emphasize the contention made. In January, 1934, the state of Arkansas adopted an act known as S. B. 8, which imposed a similar tax of 6½ cents per gallon on gasoline used within the state. Immediately government engineers integrated the amount of the tax into comparative estimates of costs and notified prospective bidders of their action advising them of the respective amounts per cubic yard which had been added on each piece of work. The purpose and effect of this notice was to raise bids to the government by an amount sufficient to cover the whole amount of the tax. The practical operation of the rule here announced is thus shown. It leaves the contractor exactly where he was and passes the tax directly to the government. This may or may not be sound policy; that it is the undoubted, inevitable effect of the decision cannot be doubted.

In the Indian Territory case the Court says: "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." The rule is sound beyond peradventure. Is it possible that it can apply to a contract to explore for oil and not to a contract to build a levee? Human reason rebels at any such suggestion.

The distinction, if there be one, must then be sought in the nature of the taxes involved. We must assume that the Court is concerned with the effect of the tax, with its practical operation, not with the name by which it is called, the way in which it is measured, the object on which it is said to be laid or the machinery for its collection. It has repeatedly so held. Any other basis of analysis would subordinate substance to form, a practice always happily rejected by this Court.

The tax there was upon capital stock representing the value of the lease; here it is upon operations. A government contract was involved as the federal instrument in each case. Unless this Court is prepared to depart from the rule announced in the Helson case it must hold a tax on operation essential to a contract to be a tax on the contract itself. No other holding can accord with facts of human experience. It cannot be said that a tax on stock representing the value of a contract or on income from a contract is a tax upon the contract and at the same time that a tax on operations from which income necessarily must be derived, is not a tax upon the contract. Choctaw, O. & G. Ry. v. Harrison, supra Gillespie v. Oklahoma, supra.

A tax upon operations here permitted extends, of course, to all operations. It is properly held in the opinion that all other machinery of appellant is as closely connected with the work as is the gasoline. It follows inevitably that the state is now permitted to tax the **operation** of each piece of machinery; each drag line, each tractor, each dredge, each tower excavator. Is not such a tax inescapably

such a one as could be used to destroy the power to make contracts in which such operations are essential?

Let us apply the same test to the Gillespie case and note its effect on the contract of lease there involved. The drilling of oil wells is an operation essential to production of income from the Indian lease. It is a proper object of excise tax. Control of oil production is an economic question now actively agitated and one upon which radical differences of opinion exist. An effective method of control is to be found in an excise upon sundry operations involved in oil production—for that matter upon the very act itself of producing oil. Congress, for its Indian wards, has exclusive dominion over oil underlying their lands. Oklahoma elects to curtail or to stop oil production in the state and lays excises on operations in the oil producing industry effective to that end. Congress has selected the means of the lease contract as a desirable one for securing for its wards the value of their oil. Such contracts provide for a royalty to the government and an "operating interest" to the lessee. As the hazard and expense of operation increases, the proportion of the "operating interest" increases and the proportion of the royalty interest decreases. If the expense of operation is made prohibitive production stops. These are facts of every day experience not susceptible of change by differing theories upon taxation.

We have then this situation. Congress desires to produce oil under its dominion by the means deemed by it most desirable. Oklahoma decrees that oil shall not be so produced and lays its taxes accordingly.

The power to lay the tax has destroyed the power to make the lease. That which is supreme has yielded to that which is not supreme.

Or let us suppose that the Oklahoma excise is not intended to be destructive but is adopted merely for purposes of increased revenue. It falls inevitably in the first instance on the operating interest and not upon the royalty owner, the government. But for how long? Only until a new lease is to be negotiated. At such time the operating interest is increased by the amount of the tax and the royalty interest correspondingly decreased. The Indian ward thus contributes to the Oklahoma treasury—to a sovereignty to which he is not subject and in the affairs of which he can have no voice.

Should he complain he must be told that the government which assumed his guardianship had powers to protect his property but deemed it unwise to do so; that it was better policy to let the state destroy the value of his lease by taxing operations essential to it than to restrain it from so doing; that income to the corporate lessee would be protected from tax should the state permit any income to be derived, because such a tax would burden the lease, but that taxes on operations, however destructive of value, were remote in incidence and therefore beyond federal control. If the ward should feel that he was in this way being compelled to contribute more than his "fair share" to the expense of Oklahoma's government he would not lack for political or judicial precedent to support his belief.

A further anomaly appears. It is the established rule of this Court that a foreign corporation seeking to perform a federal contract need not take out a permit in the state where the work is to be done. Pembina v. Penna., 125 U. S. 181; Horn Silver Mining Co. v. N. Y., 143 U. S. 302. Such a tax would obviously impede the choice of means. Such a contractor may not for like reason be charged a state occupation tax for the privilege of performing its government contract or a state franchise tax for the privilege of exercising its functions exclusively in government work within the state. All of these forbidden levies are held to be laid upon the choice of means, the making of the contract or the contract itself.

Judged by their practical effect upon the operation as a whole—the construction of government levees—they are, in the aggregate, insignificant in amount and remote in application upon the federal government as compared to the tax here questioned. It is not overstating the case to say that the gasoline excise on a single contract of average magnitude will cost the federal government more money than it will save in the combined prohibited taxes in a period of years. If similar excises follow on the use of other parts of contracting equipment, as is now definitely permitted, the burden on the government will be limited only by the ingenuity and resourcefulness of tax-minded legislators and we find the anomalous situation in which federal funds may thus be drawn upon by the several states and applied to their local needs. The immunity of the federal sovereign,

consistently described as absolute, is thus destroyed. By the doctrine here announced, the state adds to the price of government work the amount of such taxes as the state, and not Congress, may think proper. To the full extent necessary to meet its levy, it fixes the price which the government must pay to have its contracts performed. To say that the government in these circumstances is left free to exert its functions, that it is not hindered, delayed, impeded or retarded, is to disregard the facts of human experience.

It is arguable that sound public policy justifies this course; that the federal government in pursuit of its exertions in the several states should stand as any citizen with respect to local levies of all kinds; that these payments toward state expenses from the federal treasury are wholesome and to be desired from the standpoint of the general good. That we cannot share this view is of no consequence. What we do assert, with utmost deference, is that such a policy is fundamentally inconsistent with federal immunity as heretofore defined.

In the instant case authoritative expressions in the opinion of the Court have led to a situation which cannot but be regarded as unfortunate. Appellant was advised that federal immunity is absolute in form and at least stricter in substance than interstate commerce immunity; that a tax on operations in interstate commerce is a prohibited tax on interstate commerce itself and that a tax upon a lease contract is a tax upon the power to make that contract and, accordingly, forbidden, since it could

be used to destroy the power to make such a contract. Reasoning from these announced rules it could not escape the conclusion, consistent as it is with practical experience, that the asserted tax is a tax upon its contract and, accordingly, void. So believing, it declined to burden the government, as it could have done, with an amount sufficient to meet the tax, and now finds itself subjected to heavy loss as a result of having sought to apply the principle announced. It could not foresee that if it operated a locomotive partly in interstate commerce and partly in performance of its government contract that the operation in interstate commerce, the less strictly protected undertaking, would be held tax exempt and the operation in its government contract, where protection was defined as absolute and more strict, would be held taxable. Reason combined with announced precedent to dictate a course which it followed in good faith to its undoing.

With utmost deference appellant submits that the rules here announced are in direct and irreconcilable conflict with the law as repeatedly adjudged by this Court. It prays that a rehearing be granted and that upon such rehearing the judgment of the lower Court be reversed.

Respectfully submitted,

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